

**SEDGWICK COUNTY
BOARD OF ZONING APPEALS
MINUTES
July 20, 2000**

The special meeting of the Sedgwick County Board of Zoning Appeals was held at 3:30 p.m. on July 20, 2000, County Commissioner Room, 3rd Floor, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas.

The following members were in attendance: Chairman, GARY WILEY, and DENNIS GRUENBACHER, GRANT TIDEMANN were present. JANA MULLEN and KATHLEEN GIDEON were absent.

The following Planning Department staff members were in attendance: Secretary, DALE MILLER and Assistant Secretary, LISA VAN DE WATER, present. Recording Secretary, ROSE SIMMERING present.

Triplett, Woolf, Garretson, 2959 N. Rock Road, Suite 300, Wichita, KS 67226 c/o Rachel Pirner is representing the County Board of Zoning Appeals.

Glen Wiltse, Director, Sedgwick County Code Enforcement, represented by Pat Hughs, Adams and Jones, 155 N. Market, Wichita, KS 67210-1034.

WILEY: Call meeting to order. This is a continuance of Case number BZA 2000-00015. I think we left off Mr. Hughs, I think had completed his summarization of things and I think we were going to let Mr. Mills then ask Mr. Hughs some questions. Is that correct?

SANBORN AND MILLS, CHARTERD, %RUSSELL MILLS, 343 N. MARKET, SUITE 200, WICHITA KS 67202-2009 representing the applicant: I will ask Mr. Wiltse, questions.

WILEY: So, if everybody is ready, Mr. Mills, I think you can go ahead and proceed.

MILLS: Where do you want the witness?

WILEY: I would like the witness at the microphone so that everything can be heard and recorded.

VANDEWATER: Gary, Rachael Pirner isn't here yet, I don't know if you want to wait for her?

WILEY: Probably should, if that is all right.

(Rachel Pirner arrived)

MILLS: Mr. Wiltse, will you state your name for the record please.

WILTSE: My name is Glen Wiltse.

MILLS: Are you employed sir?

WILTSE: Yes, I am.

MILLS: How are you employed?

WILTSE: I am employed by Sedgwick County, as the Director of Code Enforcement.

MILLS: What is your educational background?

WILTSE: High School and approximately two years of college.

MILLS: And where did you attend these two years of college?

WILTSE: I went to Pittsburgh State and also Neosho Junior College.

MILLS: What was your area of study?

WILTSE: Just general studies.

MILLS: What specific training if any have you had in zoning?

WILTSE: I have had, basically, I have been employed as building inspector and enforcement of zoning regulations for approximately twenty-one years.

MILLS: What training did you have? You have told me what your experience is. What training do you have in zoning?

WILTSE: Just different types of seminars that I have been to in the past.

MILLS: How many seminars have you gone to?

WILTSE: I have no idea.

MILLS: Obviously, you have no training in the law is that correct?

WILTSE: No, I do not.

MILLS: As to specifically training and interpretation of zoning ordinances what specific training have you had in interpretation of zoning ordinances.

WILTSE: Basically, on the job training.

MILLS: So, you have never attended a seminar or received any educational schooling regarding interpretation of zoning ordinances correct?

WILTSE: I have been to different zoning seminars and there are typically different sessions that involve that but I have no idea at this point how many or which ones I have actually went to.

MILLS: When did you first become the Director of Code Enforcement?

WILTSE: I believe it would have been March of 1997.

MILLS: So as Director of Code Enforcement it is your understanding then that when there is an interpretation of the zoning code to be made out in the County you have that responsibility?

WILTSE: That is correct.

MILLS: Do you know whom the Zoning Administrator for the county was prior to you?

WILTSE: Yes I do.

MILLS: And who was that?

WILTSE: Scott Pike.

MILLS: You believe that Scott Pike was a competent person to interpret the zoning code?

WILTSE: I really don't have any thoughts on that.

MILLS: How long did Mr. Pike serve as the Zoning Administrator.

WILTSE: I believe Scott was with Sedgwick County approximately four or five years.

MILLS: During that period of time he was a Zoning Administrator and had the right to interpret the Zoning Code just as you do, correct?

WILTSE: I believe that is correct, yes.

MILLS: Now, I am just going to approach the witness here. I am going to hand you a document which purports to be a permit, a composting permit for our facility, the Derby Recycling Facility. Does that appear to be what that document is?

WILTSE: I would assume, yes.

MILLS: And we have in fact been composting at this location since June of 1996 is that correct?

WILTSE: Well, according to the document, yes.

MILLS: Ok, do you have any reason to believe that that document is not an accurate document?

WILTSE: No.

MILLS: Since you were not the Zoning Administrator in 1996 you would not have made the determination as to whether or not that we could compost on our property so that this permit could be issued, correct?

WILTSE: That is correct.

MILLS: Mr. Pike would have correct?

WILTSE: Yes.

MILLS: And in fact an application was submitted and I am handing you a document that purports to be an application for composting, is that correct?

WILTSE: Yes.

MILLS: And would you look at the last page of it? Who signed that document?

WILTSE: Scott Pike.

MILLS: And he signed it as approved, correct?

WILTSE: That is correct.

MILLS: So he had a right to look at our property and determine whether or not the zoning was appropriate so that he could either approve or disapprove composting at that location, correct?

WILTSE: Yes.

MILLS: And that is what he did, correct?

WILTSE: Yes.

MILLS: Now, in your review of the Zoning Code, I assume you review the Zoning Code before you rendered a decision in this case, correct?

WILTSE: That is correct.

MILLS: Did you find anywhere in that Zoning Code that gave you the right to reverse the decision of Mr. Pike when he said that we could compost at this location?

WILTSE: I personally didn't look at it for that reason.

MILLS: Are you aware in your years of experience in interpreting the Zoning Code of any portion of the Zoning Code that allows you to reverse the decision of a former Zoning Administrator in this regard?

PIRNER: Wait a minute Mr. Mills, I just want, by way of clarification we are talking about a permit here, asking for an agricultural exemption. I don't want to confuse or mislead the Board of Zoning Appeals, and I know that is not your intent.

MILLS: Absolutely not.

PIRNER: But, we are really talking about just this application and this application for an exemption today, isn't that correct?

MILLS: No. As part of this application, if our property was already determined by a prior Zoning Administrator to be property that is suitable for compost, this goes to the very heart of this case.

PIRNER: Help me out. Well, this permit, you are not suggesting to the Board that the permit in any way found that your property was agricultural exempt when it was issued back in 1996, that is not what you are saying is it?

MILLS: Absolutely.

PIRNER: Well, I am trying to figure out what your argument is, so, your position is that this permit somehow made this property upon which you are conducting the composting activities or were back in 1996, that somehow this permit changed the character of your property to agricultural property?

MILLS: Absolutely not. What I am saying is that a prior Zoning Administrator reviewed this application, he looked at the Zoning Code and he determined from his review of the Zoning Code that we had the right to operate a composting facility at

this location. That is what I am trying to clarify.

PIRNER: Thank you for clarifying that position, I thought you were going in a different direction with that.

MILLS: Now, if I can go back to my question. Is there anywhere in the Zoning Code that allows you to reverse a decision of a prior Zoning Administrator?

WILTSE: I really haven't looked at that. It doesn't state whether I can or can not. I think I am eligible for my own decision. If you are asking for an interpretation and you did ask for the interpretation.

MILLS: Ok, I will do it the hard way sir. Find it. (He puts a book in front of Mr. Wiltse).

WILTSE: Find what?

MILLS: Find where in the Zoning Code that you have the authority to override prior decisions of another Zoning Administrator.

PIRNER: Well, I don't mean to keep interrupting your cross examination, but Mr. Mills, I think you are probably aware, as am I, that there is some case law out there. And that would be a legal matter talking about whether or not zoning administrators can act beyond the scope and whether or not they are to continue in an error in terms of interpretation.

MILLS: Counsel, are you being an advocate for one of the sides here or are you being an impartial attorney?

PIRNER: I believe that I am being an impartial attorney. That certainly is my intent. I certainly do not want to confuse or have the Board of Zoning Appeals mislead. This is a new line of argument and it seems to be a little different than the argument that you presented last week Mr. Mills.

MILLS: I didn't get to cross-examine this gentleman right here. This would have been my line of argument last week, it would have been my line of argument two months ago.

MILLER: I guess that Planning staff would advice that the issue today is not whether or not the previous code enforcement director was correct in his opinion in issuing the permit. The issue today is whether or not composting is a permitted activity on the property as it is zoned today, or agricultural exempt, either way.

MILLS: The fact of the matter is, if the prior Zoning Administrator was correct and if the position that the present Zoning Administrator is supposedly correct. You

might be able to prospectively say, that you can't compost in the future, but as to this piece of property he can not retrospectively go back and change what has already been done.

MILLER: I would disagree with that, there is no obligation on a part of a public employee to continue an error if in fact it was the opinion that the previous director was in error in issuing the permit.

MILLS: Than the question is who says that he was in error? Who gets to say that he is in error?

MILLER: Mr. Wiltse as the Zoning Administrator is empowered by the Code, by the section that we discussed at the last meeting to make those interpretations.

MILLS: I disagree and we will go on. Now, did you bring a copy of your opinion with you today?

WILTSE: Yes, but I don't have it with me up here.

WILEY: Here Lisa, are you talking about this letter where Mr. Wiltse responded?

VANDEWATER: It is in the record.

MILLS: What was the date of your opinion?

WILTSE: The letter is dated May 5th.

MILLS: What information did you have in your possession that you on relied in making your decision?

WILTSE: Well, we rely on not only the Zoning Code but also outside counsel.

MILLS: When you say outside counsel who are you referring to?

WILTSE: Pat Hughs and Roger Hughey.

MILLS: So you went and discussed this issue with some attorneys. Is that correct?

WILTSE: That is correct.

MILLS: Was your decision partly based on what the attorneys' thought?

WILTSE: Well, by hiring outside counsel you normally would use part of their decision on basing the final determination.

MILLS: So is the answer yes?

WILTSE: Yes.

MILLS: Now, when did you hire this outside counsel?

WILTSE: It is actually hired through our legal department. So, the hiring did not actually come through me so I couldn't give an exact date.

MILLS: But, it is your testimony however that before you issued this opinion on May 5th you had conversation with outside counsel?

WILTSE: Yes.

MILLS: Anyone else?

WILTSE: Initial conversation with one of our county attorneys, Michelle Daise.

MILLS: Anyone else?

WILTSE: I assume I talked to other people about it, I talked to MAPD and other people but I don't know exact dates or times.

MILLS: You don't know who at MAPD you spoke with?

WILTSE: I spoke to probably numerous people, I believe I talked to I can't remember. I don't have it down who I have talked to on it.

MILLS: Now, what documentation, if any did, you have that you relied upon in rendering your decision?

WILTSE: The Zoning Code and documentation that outside counsel presented.

MILLS: Ok, what documentation did the outside counsel present that you relied upon?

WILTSE: They had looked at different case law on the issue.

HUGHS: I would like to advise Mr. Wiltse that it is a privilege to not reveal communication with outside counsel that he had. And that he can assert that privilege and not answer questions that ask for the content of his communication with outside counsel.

MILLS: I guess I need to ask a question to counsel for the BZA, are we bound by the rules of evidence in this?

PIRNER: Yes. I think that we are pretty loose with respect to the rules of evidence. But when it comes to either work product or attorney client privilege, because those are waiveable privileges, I certainly don't believe that it would be appropriate for either party to be asked to waive those privileges because, of course, later on that could be argued as a permanent waiver of those privileges.

MILLS: What specific documents then did you review in making your decision?

WILTSE: Basically, just discussion with outside counsel.

MILLS: Ok, so there were no documents that you reviewed?

WILTSE: I did not do any research on case law if that is what you are asking, no.

MILLS: No that is not what I am asking. Is there any written document that you reviewed, other than the Zoning Code in rendering your decision?

WILTSE: To the best of my knowledge, no.

MILLS: Now, at the last hearing, Mr. Hughs had submitted some paperwork to the BZA, you didn't have his report on May 5th correct?

WILTSE: Have whose report?

MILLS: Mr. Hughs' report that he presented to the BZA last hearing.

WILTSE: I didn't get it prior to the meeting, no, I don't believe.

MILLS: Or prior to May 5th?

WILTSE: Talking about the letter and that type of stuff that Roger had? Yes I did have that then.

MILLS: I am sorry sir, I couldn't hear you sir.

WILTSE: If you are talking about a letter addressed to me by Roger, yes, I did have that prior to May 5th.

MILLS: No, sir I am not talking about that. What I am talking about is any report that was handed to the BZA at our last hearing by Mr. Hughs. Did you have it?

WILTSE: I don't know what report you are talking about.

MILLS: Do we have a copy of the record counsel?

VANDEWATER: I got the information that Pat Hughs gave.

HUGHS: For the record at the last hearing I did present to the BZA the administrative record that had been provided to the Zoning Administrator. It consisted of materials that were presented by counsel for Derby Recycling and including several letters that had been written to the Zoning Administrator, one of April 26, 2000, April 21, 2000, a number of submissions that went with those. A letter of April 18, 2000, a letter of April 10, 2000 addressed to Dale Miller of the Metropolitan Area Planning Commission. The letter to Michelle Daise the county counselors office, again and attachments that would have been part of those documents.

PIRNER: Let me just by way of clarification. I know that, I believe, that last week that Mr. Mills, you were provided with some documents that captioned the County's argument. Is that what you are talking about?

MILLS: That plus this document.

PIRNER: I don't see that this other document that you have that would have been prepared by Mr. Hughs part in parcel of that. Do you have that with you?

MILLS: All that I am trying to figure out is what he had when he based his opinion what information. This is part of it and I want to get it into the record.

WILTSE: That is what I had and I thought you were getting into that I had reviewed all the case law and all that type of stuff.

MILLS: They have, not you, is that right?

WILTSE: They looked at the case law, yes.

MILLS: All I am trying to get across here is... Do we have exhibit stickers or something?

HUGHS: This is a copy of what I presented last time for the record.

VANDEWATER: This is exactly what was presented last time and that was a copy of what we gave to Mr. Mills.

PIRNER: And Mrs. Van de Water is the keeper of the record so she has got those.

VANDEWATER: Yes, that is what you got a copy of.

MILLS: So the stack of documents that has a letter dated April 26, 2000, from my office to you and then several pages with the last page being the page of the opinion

of the Gaspari case. That was essentially information that I forwarded to you, is that correct?

WILTSE: That is correct.

MILLS: So we know that you had that information when you were making your decision, correct?

WILTSE: That is correct.

MILLS: What other written documentation did you have in your possession on May 5th, 2000, when you made your decision?

WILTSE: I have a letter addressed to me from our outside legal counsel.

MILLS: Was that submitted as an exhibit?

WILTSE: I don't know whether it was or not. It was written directly to me.

PIRNER: It sounds like that is attorney client privilege.

MILLS: Are you going to exercise the privilege or is he?

PIRNER: Well, I am just pointing out, it sounds to me, as an attorney, when you are talking about a client receiving a letter addressed to him from his counsel. I understand that you are making your points, and I don't want to be an obstructionist as it relates to that, but by the same token I don't want you to try and take advantage of this witness and get into his attorney client privileged materials.

HUGHS: I think I can answer the question about what was presented in the record by me last week and there are not letters that were written by outside counsel to Mr. Wiltse that were presented in the record before the Board of Zoning Appeals.

MILLS: Now, when you made your decision, did you consult with any agriculture experts?

WILTSE: No.

MILLS: You had a report from Mr. Bill Eberle from Kansas State University did you not?

WILTSE: I believe that was one that you had sent if I remember right.

MILLS: Did you review that report at all?

WILTSE: Yes, I have looked at it?

MILLS: Did you ever go to our property before making your decision?

WILTSE: No.

MILLS: When you mentioned that you reviewed the Zoning Code did you review the Comprehensive Plan?

WILTSE: Not for this decision, no.

MILLS: Ok, did you review the zoning maps in connection with your decision?

WILTSE: You mean did I look at the zoning maps and see what it was zoned?

MILLS: Did you review any zoning maps in connection with your decision?

WILTSE: I have looked at the zoning map to see what the actual zoning was on it at one time, yes.

MILLS: And what did you find when you looked at the zoning maps to see what the actual zoning was at that time.

WILTSE: Well, if I remember right the zoning on this tract is Rural Residential.

MILLS: Sir, I am handing you what I believe to be a portion of the Zoning Code that deals with Rural Residential districts, can you review that and tell me if that is in fact true copy of that portion of the Zoning Code?

WILTSE: I would say that it is, yes.

MILLS: And does it not state that agricultural uses are permitted by right in "RR" zone?

WILTSE: That is correct.

MILLS: Now the Zoning Code does not define what an agricultural use is does it?

WILTSE: It goes into different phases of what they consider agriculture but a 100%... it doesn't say everything that is agricultural.

MILLS: Would you look at the section on definitions and see if you see a definition of agricultural uses set out therein.

WILTSE: Yes, I do.

MILLS: Is there a definition of “agricultural uses” those two words together?

WILTSE: It does not specifically say “agricultural uses”, no.

MILLS: Likewise the word “compost” will not be found in the Zoning Code will it?

WILTSE: I would say no, it is not in there.

MILLS: So, it is your understanding that you have to interpret what is in the code right?

WILTSE: Yes.

MILLS: Well how can you interpret something that is not in the code? What gives you the authority to do that?

WILTSE: There is a provision that allows you to take like uses and my opinion was that if the product is grown in the land then it would be an agricultural use but to have a product delivered to the site then it becomes a different type of use.

MILLS: Ok, what provision are you referring to?

WILTSE: Well, when you look at like, agricultural processing or agriculture or even if you look at like recycling processing center the definition.

MILLS: Maybe you misunderstood my question. What I was trying to get at, you said there was a provision somewhere that allowed you to put it in like uses that is the provision of the Code that I want you to point out to me.

WILTSE: Ok, it gives the Zoning Administrator, on page 197, Classification of Unlisted Uses. “For uses not specifically listed in this code or not obviously included in one of the comprehensive use definitions, the Zoning Administrator shall have the authority to determine the appropriate district or districts which allow the use based on the use’s similarity to uses which are listed.”

MILLS: Ok, what standards do you go by when making your interpretations?

WILTSE: I will look at the definition to see if something falls within any of the definitions.

MILLS: Any other specific standards that you were told that you could use?

WILTSE: If you look at the definition and then what takes place in the process of whatever is being done on the property you can look at both of those types of uses.

MILLS: Maybe I am not making myself clear. What I am trying to figure out is, for instance in a request to amend a zoning there are specific criteria that you look at, would you agree with that statement?

WILTSE: Yes.

MILLS: What specific criteria are set out in the Zoning Code that the Zoning Administrator is to look at in interpreting a portion of the Code?

WILTSE: Short of looking at definitions and how it is going to be used and what the land is going to be used for, I honestly don't know of any other process.

MILLS: Do you know what the zoning of this property was in 1996?

WILTSE: I believe that it was Rural Residential.

MILLS: And that is what it is today?

WILTSE: I believe so, yes.

MILLS: Now, can you point out for me sir, just by number if you will and title the specific section of the Zoning Code that you looked at in reaching your determination?

WILTSE: I don't understand the question.

MILLS: You say you looked at the Zoning Code to make your decision, correct?

WILTSE: That is correct.

MILLS: Now obviously you looked at some portion of the Zoning Code and you didn't look at other portions of the Zoning Code correct?

WILTSE: That is correct.

MILLS: What I am trying to figure out sir, what sections of the Zoning Code specifically did you look at to help you make this decision?

WILTSE: Well, first I look at what the request is, and if they are requesting in this case an agricultural exemption, you look at definition under agriculture and see if it falls under the agriculture definitions. Then you look at other definitions if it involves recycling or whatever and then you look at those definitions to try to make it fall into one of those categories if that use is not 100% spelled out.

MILLS: I understand the process of your thinking. I am just trying to get at what

specific sections of the Code did you look at. What numbered section in the Code did you look at?

WILTSE: I don't have all of these numbers in front of me. I would go back to that one provision that we read there.

MILLS: I think I provided you with a copy of the Code. Would you want to look at the Code to refresh your memory?

WILTSE: No, I have a Code here.

MILLS: I will object, that counsel for Mr. Wiltse is pointing out sections of the code that Mr. Wiltse is suppose to be testifying about. Counsel do you believe that it is proper for him to be able to aid in the testimony of the witness?

PIRNER: Well it seems to me...

MILLS: I have never seen that before.

PIRNER: Eventually, I suppose the District Court will look at this. But, this is not an insubstantial book with an insubstantial number of provisions. I think this witness has testified that he reviewed the Code in connection with this and now you are asking him to specify each provision, each sub-section within this 200-page book. We could take a break if you would like to do that and Mr. Wiltse can have an opportunity to identify these. I believe that we are trying to get through this as quickly as we can.

MILLS: I am too and if you will stop interrupting me maybe we can. But, I think I have a right to ask him what provision of the Code he looked at.

PIRNER: Excuse me, I am not disputing that. I don't believe that I interrupted you this last time, you asked for my interjection. And to the extent that you would like for him to verse and line exactly what portion of this Code he reviewed that is going to take him a few minutes. I would assume and we, like I said, we can take a break and he can take a few minutes and then give you the citations to the record if that is what you are really after. Or you can ask him in general terms what parts of the Code he reviewed.

MILLS: What I am asking for counsel is his testimony not that of his attorney.

PIRNER: I understand that, and I am just trying to, and I know that you are not trying to be unfair to the witness, but we have got a multi-page document. We are spending more time on this counsel to counsel talking but if you want to give him a few minutes and allow him to find the book, verse, and page that he is looking for, I think that it is what he is trying to do.

MILLS: That is fine by me, as long as he is the one that is doing that and not his attorney.

WILEY: May I interject something. We are not having a trial here. We are trying to make a determination here. If you want to have a trial later let's do that, but now we are trying to make a determination as to whether Mr. Wiltse letter was in fact correct or not, his opinion. So, I don't care about what sections he comes from, he wrote the letter, I don't care what the back up is on that. Maybe I am wrong.

GRUENBACHER: You are not wrong at all, we are supposed to be deciding if composting is an agriculture use.

MILLS: Sir, the problem with that is that I have to make my record today, the court is going to look at if you would decide against me the court would look at the record that is made here. I don't believe that I would be entitled to a *De Novo* hearing. Unless counsel says that I would be maybe that would move this thing quicker, if all the parties want to agree to that.

WILEY: I can tell you we have had several appeals, in the years that I have been on this Board of Zoning Appeals, and we have never went through this.

MILLS: I am just trying to do my job.

WILEY: I understand.

HUGHS: I realize this is an informal hearing, generally, so I am cautious to object. But, I would like to object this point. I believe that the question before the Board of Zoning Appeals is purely a legal one and that it is not necessary to take any evidence from Mr. Wiltse about how his opinion was generated or what he looked at. Therefore there is no need to go on with the questioning at all.

MILLS: I disagree with that totally. When he questioned me, there was no interruption, there was no statement that I should not be allowed. As a matter of fact as I recall what happened at the last hearing I said that if he is going to question me then I want the right to question him and everybody agreed that I would be given that right. Now, he is coming in trying to reverse that decision, I should be allowed to go forward with my examination to make my record.

WILEY: Ok, let's just be a little swift with it.

MILLS: We still have the question about regarding the specific sections of the Code.

TIDEMANN: I suggest we give Glen the time to look it up and we just sit here and wait.

MILLS: Ok that is fine.

PIRNER: Mr. Mills, if I could make a suggestion, which might move things along, because we are at 4:20 p.m. now. Mr. Wiltse, could hand in or supplement the record with those sections and specific sites, that I am sure would be more complete than what we are going to get today, post hearing. Would that be satisfactory with you?

MILLS: No.

WILTSE: I am ready, how do you want these listed, do you want page numbers? I look at the general provision and I look at agricultural exemption and I look and see if that falls under agricultural exemption and that would be page 2 Section E with is agricultural exemption. Then I went to definitions, page 8, and looked again under all the agricultural definitions which would be E, F, G, and H. Then I went to the recycling section, under recycling processing center page 25 and one of them I looked at was H. Then in the section that is classified "Decision Makers" I looked at the entire chapter which is Chapter 6, went through the issue on page 197 about going through written interpretation, Section H-4 talks about classification of unlisted areas. In all honesty, in general you look through the whole Code. To take just certain specific areas it is tough to do where you look at the entire Code and to look at when you make this decision is a tough decision to just say that I looked at one specific page and not another one.

MILLS: Is that all the provisions that you specifically remember at this time?

WILTSE: Well, it is difficult to go back almost two months and say these are the only two areas that I looked at. I look at the entire Code, so to say that I looked at one specific page and not another it is pretty hard to say that.

MILLS: But, the ones that you have just mentioned are the ones that you felt were most important to your decision.

WILTSE: Well that is part of it. There are other areas, and to go back at this point and try and redevelop what I did when I did not keep record of every page is impossible to do.

MILLS: Ok, let's move on. The term "agricultural product" is not defined in the code is it?

WILTSE: I don't believe so.

MILLS: But, you did have a copy of KSA 2-2301, which defines agricultural products did you not?

WILTSE: Yes.

MILLS: Would you please read that aloud.

WILTSE: “The term “agricultural products” shall mean and include products and foods, in raw or processed form which are obtained in whole or in part from plants or domestic animals.”

MILLS: You understand, do you not sir, that compost is obtained in whole or in part from plants?

WILTSE: Yes.

MILLS: So it would be your testimony then that given the definition that the Legislature has given use, that compost would be an agricultural product?

WILTSE: Given that definition, I would assume yes.

MILLS: That is your interpretation?

WILTSE: I am looking at this briefly, and I would say yes.

MILLS: As you understand it composting is done in rural areas correct?

WILTSE: I have not visited any farms in Sedgwick County to see if they do composting.

MILLS: So, you haven't visited any farms and you haven't visited any composting facilities is that correct?

WILTSE: I grew up on a farm and the farms I was ever on, it was never a process that any farmer that I knew did.

MILLS: I have provided you with a document or a portion of a book regarding farm composting did I not.

WILTSE: Yes.

MILLS: Do you have any reason to believe that composting is not a process that can be done on a farm?

WILTSE: I think that it can be done in the City, if it is zoned for it.

MILLS: But composting is, for instance, if you have a manure pile, and it is a static pile, is that composting or do you know?

WILTSE: I never really thought about it.

MILLS: So, you say that you have never thought about it. Can you think about it now and determine whether or not in your mind if it is composting?

WILTSE: We never called it that before. I mean it was just something that was typically, something that was going to get hauled off at some point. I honestly without giving it more thought than just a few minutes am not in a position that I would want to make that determination at this time.

MILLS: What information would you need to make that determination?

WILTSE: I don't know.

MILLS: Now, you have before you a permit that shows that we have been composting since 1996. Are you aware of any complaints that have been rendered as a result of that activity by any citizen?

WILTSE: No complaints were addressed to me. I was asked to sign a license approximately 2 1/2 years ago by the Health Department and at that time we did not sign them.

MILLS: My question, was there a complaint regarding our operations of this composting facility by a citizen through your office?

WILTSE: The only complaint that I personally received was after the process was started on the transfer station.

MILLS: You say that there were some discussions about mistakes and that maybe Mr. Pike had made in the past. Have you ever made a mistake?

WILTSE: Probably so.

MILLS: It is just as possible that you are making a mistake here today just like you say Mr. Pike was, ain't that true?

WILTSE: That is up to somebody else to decide. I feel comfortable with my decision.

MILLS: Have you ever seen composting in downtown Wichita?

WILTSE: No.

MILLS: So it is a fair statement to say that composting is normally done in an agricultural area, correct?

WILTSE: I honestly have never been around any composting so I don't know a commercial process. So I honestly don't know where it would be done.

MILLS: Well, if I told you that composting is done in agricultural areas would you have any reason to dispute that?

WILTSE: I have never had any complaints on it so I don't know if I would dispute it or not.

MILLS: You say you looked at the zoning map, the area where the composting is occurring that is a rural area is it not?

WILTSE: Yes. It is zoned Rural Residential I don't know what you are terming rural area I guess.

MILLS: Sir, I am going to hand you some pages that I have stating that are portions of the 1999 Comprehensive Plan.

PIRNER: Do you want this to become part of the record, Mr. Mills?

MILLS: Yes I do. Does that appear to be part of the Comprehensive Plan?

WILTSE: I would assume yes.

MILLS: Sir, the document that I have handed you and that you have identified as part of the Comprehensive Plan has a map attached to it correct?

WILTSE: Yes.

MILLS: Does not that map indicate that the area around our facility is rural?

WILTSE: You want to mark where your facility exactly is?

(MILLS approaches and indicates with a pen.)

PIRNER: Mr. Mills, for the record you might just want to go ahead and make a mark on that.

WILTSE: Well, the mark appears to be in a rural area but it is hard to read.

MILLS: In looking at the portion of the Comprehensive Plan that I have provided to you, this was an update from the Comprehensive Plan that existed prior to this 1999, Amendment correct? What I am trying to say is, that it also cites out some language regarding agricultural use, and rural use, correct?

WILTSE: Yes.

MILLS: The agricultural use has now been changed to what is now called Rural, correct?

WILTSE: Yes.

MILLS: Within both definitions the old version, strictly agricultural use, and the new version Rural use, it sets out that there are several uses that can be done that are not normally thought to be agricultural correct?

WILTSE: Well.

MILLS: If you would please read that Section that talks about rural so that the Board can hear it.

WILTSE: Ok. "Rural: This category encompasses land outside the 30 year Wichita urban service boundary and the small city growth areas. This category is intended to accommodate agricultural uses, rural based uses that are no more offensive than normal agricultural uses, and large lot residential subdivisions with provisions for future water and sewer services."

MILLS: And that is a part of the new Comprehensive Plan, correct?

WILTSE: I don't have one to compare it to here. But, I am assuming that you took it out of that. But I can't guarantee that, but I would assume that it is.

PIRNER: Mr. Mills, it looks like this is a gray line version of the Comprehensive Plan. Is it the only identifying information you have from where you got these pages here on the first page of this?

MILLS: What is the question?

PIRNER: I am trying to figure out if there are different versions of the Plan and it looks like this is the only page. There is not an end page to it or anything else that would tell us what version this is, I take it.

MILLS: It is the 1999 update to the Comprehensive Plan that is the version. On April 27, 2000, you sent a letter to me did you not?

WILTSE: That is correct.

MILLS: Does that appear to be the letter that you sent to me?

WILTSE: That is correct.

MILLS: In that letter you described our operations as commercial composting operations, correct?

WILTSE: I don't see that I said that. Yes, I did.

MILLS: Ok. You believe that, you wouldn't have written that if you didn't believe it correct?

WILTSE: That is correct.

MILLS: So, would it be a fair statement to say that you believe that we are engaged in a commercial production of compost?

WILTSE: My opinion is that if the product is not grown on site then...

MILLS: Sir, would you answer the question?

WILTSE: Yes that is correct.

MILLS: You previously testified that compost is an agricultural product, correct?

WILTSE: Yes.

MILLS: We would be then involved in the commercial agricultural production, correct?

WILTSE: If it is raised on-site. Raised or grown on-site.

MILLS: Sir, I have provided to you a Kansas Supreme Court decision called Miami County v Svaboda. Do you recall that?

WILTSE: Yes.

MILLS: In the highlighted section in that opinion, did you read it?

WILTSE: Yes, I did.

MILLS: Can you read it aloud?

WILTSE: "Zoning ordinances are in derogation of the right of private property and should be liberally construed in the property owners favor where exceptions appear in such regulations they are liberally construed in favor of the property owner."

MILLS: So, if you are going to follow that law, you are going to liberally construe these ordinances or regulations in favor of the property owners, correct?

WILTSE: I would assume yes.

MILLS: You would be willing to do that, wouldn't you?

WILTSE: Yes.

PIRNER: Mr. Mills, it just seems to me that when we are having a lay person begin to interpret Supreme Court cases maybe that is best saved for your argument.

MILLS: Well, we are having a lay person interpret statues, ordinances, and regulations.

WILTSE: No, I don't interpret Statutes. This is what I am basing it on.

MILLS: Can I continue counsel.

PIRNER: Well, it is up to the Board, it seems to me that it would be more appropriate for you to address this in terms of argument.

MILLS: I have to lay the foundation, I have to lay the record. If I can't lay the record I won't have a record.

PIRNER: The case is a part of the record and I believe that your argument from last week is a part of the record.

MILLS: If I can continue with my questions, the Board will ultimately find why I am asking these questions.

WILEY: How much more time are you going to need?

MILLS: Probably about another 30 to 45 minutes. Maybe not that long, it depends on how quickly he answers.

GRUENBACHER: Address the question that is proposed.

TIDEMANN: This is going way beyond our scope.

MILLS: Back to your willingness to give the liberal interpretation you have already extended, that by finding that compost is an agricultural product would you not then have to provide that same analyzes to the issue to whether we are engaged in the activity of a commercial agricultural production?

PIRNER: Again, Mr. Mills, maybe I need to take a break and meet with the Board. But, it just seems to me that when you are asking this fact witness to construe Statutes and case law we are really probably beyond the scope of the Board of Zoning Appeals aren't we?

MILLS: I am asking him to construe...

TIDEMANN moves GRUENBACHER seconds: Mr. Chairman, I would like to make a motion that we take a break so that we can visit with our legal counsel at this point.

WILEY: We will return when?

TIDEMANN: Five minutes.

WILEY: The meeting is adjourned for the Board to meet with Legal Counsel.

WILEY: Back in session. It is roughly 10 minutes until 5:00 p.m. Mr. Mills, we are going to give you until 5:00 p.m. to finish your presentation here and we would like you to stick to the facts and not legal issues in this case. After you have completed, then we will give Mr. Hughes three minutes and yourself three minutes then after that.

MILLS: If I understand what you are saying sir, is that you are denying me the right to present my case and too cross-exam this witness.

WILEY: We are not denying you that right, we are asking you to stick to the facts and not legal issues in the balance of your presentation.

MILLS: I am sir.

WILEY: We are hearing lots of legal issues here.

MILLS: I understand, but the problem that we have here is...

WILEY: You have until 5:00 p.m.

MILLS: I want to state on the record that I am being denied the right to present my case by members of the Board of Zoning Appeals. I would ask to take a recess so that we can confer with the court so that we don't have to come back and do this again at a later date.

PIRNER: I will state for the record that the BZA has been exceedingly gracious in allowing you the opportunity to exam this witness who is the Code Enforcement Director. We have not discovered many facts from him, aside from the fact that he grew up on a farm. And ordinarily when we are examining witnesses we are looking

to the witness to establish facts and we leave the interpretation and the argument of the law up to counsel and ultimately up to the governing body. It seems to me, Mr. Mills that we have spent an excessive amount time over the course of the last hour and almost ½ now examining Mr. Wiltse as to his interpretation to statutes and his interpretation of case law. So, that being said, we are not prepared to recess at this time and allow you an opportunity to go and see the District Court. Depending on what the BZA rules you may or may not appeal the ruling and that is where you are going to be, which is District Court in any event.

MILLS: The problem is that I will not have an adequate record and then it will have to be brought back here because I was not allowed to make an adequate record. I am wasting my five minutes. Mr. Wiltse, did you look at the definition of “raise” when you reached your determination?

WILTSE: Of “raise”?

MILLS: The word “raise”.

WILTSE: I didn’t go into the Webster’s Dictionary.

MILLS: Look at the Black’s Law Dictionary and see what the word “raise” means and read it out loud.

WILTSE: “Raise: To create; to infer; to create or bring to light by construction or interpretation. To cause or procure, to be produced, bred or propagated. To bring together; to get together or obtain for use or service.”

MILLS: I would ask that that definition of the word “raise” in the Black’s Law Dictionary be admitted into the record and I would ask that the letter of Mr. Wiltse, dated April 27, 2000 be admitted into the record. Mr. Wiltse, why didn’t you look into the definition of the word “raise”?

WILTSE: I would have probably, but I never even thought about looking at every word definition.

MILLS: Is the term agricultural purpose defined in the Code?

WILTSE: Agricultural purpose, I don’t believe so.

MILLS: It is not defined in the Statutes either, is it?

WILTSE: I couldn’t tell you.

MILLS: Isn’t it true that your counsel gave you a report that said that it wasn’t? That’s in the record?

WILTSE: I don't know everything that legal counsel gave me verbatim.

MILLS: If I were to advise you that it was in the record by your counsel that agricultural purpose was not defined in the Kansas Statute would you have any reason to dispute that?

WILTSE: I wouldn't have any reason, I guess.

MILLS: Not being allowed too go forward with my questioning I guess I need to address some of the arguments that I would like to make. Mr. Wiltse, I appreciate your patience. It seems when you look at the law and you look at the interpretation made by Mr. Wiltse, that he didn't take into consideration some of the things that he should have taken into consideration.

One of those being the Comprehensive Plan. The Comprehensive Plan says that other uses common in rural areas can be done in agricultural or rural areas. You heard Mr. Wiltse say that this property is a rural area. Composting is done in agricultural areas and so we believe it was Mr. Pike who was correct back in 1996, when he said that we could compost on this property. Mr. Wiltse also failed to look at the issue of the word "raise" and it says to cause and procure to be produced and that is exactly what we are doing. We are producing something that is an agriculture product.

The most important thing that I want to leave you with because my five minutes until prior to 5:00 p.m. is drawing near. It is found on page 2 and page 3 of the Code and if you will remember the testimony of Mr. Wiltse. What he said was that we were producing an agricultural product. That product was called compost. His letter of April 27, 2000, says that we are involved in commercial operation or production of compost which is the agricultural product.

Now, when you read the agricultural exemption section of the Code that says, that "all lands used for agricultural purposes as defined within this Code are located within an area where land is used for commercial agricultural production." That is exactly what we are doing and that is exactly what Mr. Pike found and unfortunately Mr. Wiltse is mistaken in his interpretation. He has now though admitted to you that we are engaged in agriculture production. He has also said that there isn't anywhere in the code where the term "agricultural purposes" is specifically defined. This is the only thing that we have to tell us where agricultural purposes can be conducted and we now have the admission by Mr. Wiltse on the record. So, we believe if there is anything that is positive of the issue it is that testimony right there. What we have to keep in mind is what the law says. The law says that Mr. Wiltse, just like Mr. Pike before him and you folks are to do what? Look at zoning ordinances and they are in derogation of the right of property and should be liberally construed in the property owner's favor. That is what we are asking you folks to do. Liberally construe in the property owners favor where exceptions appear. Are there exceptions? Yes, there is. Agricultural purpose is not defined and they should be liberally construed in favor of

the property owner. Will we have the testimony that supports our position? We have the law that supports our position and we respectfully submit to you, and I know that we have had a difficult hearing, but I would respectfully submit to you that if you look at the Code and you look at the law that has been submitted, and you listened to the testimony of Mr. Wiltse you have to see that Mr. Pike was correct. Everybody makes mistakes. I am not here to attack Mr. Wiltse, we just believe that in this instance he made a misinterpretation and we are asking you to reverse it. Thank you.

WILEY: Mr. Hughs.

HUGHS: Mr. Wiltse, you are called upon to answer essentially what is completely a legal question and that is whether a commercial facility which, composts land and animal waste shipped in from off site is exempt from zoning restriction as an agricultural use of the land. It really doesn't matter by what mechanism Mr. Wiltse reached his opinion. His opinion was that it is not an agricultural use of the land. That opinion is entitled to interpretation. The reason that he did reach the opinion was as he told you on advice from legal counsel and we discussed last time at length why we could conclude that a commercial composting facility is not an agricultural use, because it is not a growing of crops, or the raising of livestock, because it is solid-waste processing, and because it is defined under the Code as a recycling processing center. I don't think that anything that we have heard that Mr. Wiltse's interpretation of the Code is that indeed it is not an agriculture use, is erroneous.

WILEY: Mr. Mills, would you care to say anything else? You have three minutes.

MILLS: No, I am kind of beating a dead horse here at this point. Our position we think is fairly clear. We think for all the reasons and for all of the evidence that has been presented, there really is no basis for his decision. We just believe that when you read the language of the agricultural exemption and when you hear Mr. Wiltse's testimony there really is no other choice.

MILLER: Anybody in the audience?

WILEY: Is anybody in the audience that wishes to be heard on this? I think I mentioned that last meeting but nobody was here. Please come up to the microphone please and state your name and address. Your name please.

KERRY AND CHARLOTTE HANSARD, 9416 S BLUFF, DERBY KS 67037: We own some property on the other side of the river just west of the recycling property. This is the first that we heard of this going on. We knew that there was stuff going on at that side of the river and we may be out of turn here on it. But, the problem we have right now is the smoke right now.

CHARLOTTE HANSARD: It is the constant burning.

KERRY HANSARD: We are unable to open our windows at night. If we do it will set the smoke detectors off on certain nights. This is our concern. The composting if the guy wants to pile grass out there all he wants, fine, but the burning has got to stop.

MILLS: I am going to object to this, it has no relevance of the issue before the BZA.

CHARLOTTE HANSARD: We may not belong here but we have concerns here, we had no idea what was actually going on across the river. Everytime I see the smoke I am thinking maybe they have a special permit. I did not know that it was allowed to burn like that in the County. I received a letter from Dad, that the Planning Commission sent him and that is why we are here to investigate and see what is going on.

WILEY: This is strictly on the composting and I don't think there is any burning that is happening at the composting.

MILLS: We have a burn permit. The area that is permitted.

GRUENBACHER: In the composting operation?

MILLS: It is a separate area.

WILEY: It is a separate area, it is not a part of the composting. So that would be a separate issue in this respect. This is strictly regarding the composting that is going on. Nobody else in the audience. I will close it and bring it back to the bench here.

TIDEMANN moves GRUENBACHER seconds: That the Board recess into executive meeting to consult with the attorney, which will be deemed privilege in the attorney client relationship for the purpose of discussing zoning laws and regulations and resume the Board meeting in this room in 15 minutes.

MOTION CARRIES 3-0.

WILEY: Board of Zoning Appeals back in session at 5:25 p.m. I would entertain a motion on this case.

GRUENBACHER moves TIDEMANN seconds: Having considered the entire record regarding this matter and having heard the evidence as presented to the Board here today, I move that the Board make the following findings:

1. **That the Board of Zoning Appeals has jurisdiction to hear this appeal pursuant to KSA 12-759(d) Section 2.12.590 of the Code of Sedgwick**

County Kansas.

2. That the Board makes the following findings of fact:

- A) That the Zoning Administrator, Mr. Glen Wiltse pursuant to Article V, Section E (15) of the Wichita-Sedgwick County Zoning Code have the authority to make the interpretation of the Agricultural Exemption found in Article I, Section E of the Wichita Sedgwick County Zoning Code.
- B) That the composting of raw materials on this site is a commercial activity that uses materials not produced on site and is therefore not an exempt agricultural use.
- C) The Board further finds that the interpretation of the Zoning Administrator as set forth in this letter of May 5, 2000 was reasonable and is supported by evidence presented at this hearing.
- D) The Board further finds that the appellant has not met his burden of proof to show that the interpretation was in error.

Therefore, based upon the foregoing, I move that the interpretation of the Zoning Administrator herein be affirmed. I direct counsel for the Board to prepare written findings of fact and holdings consistent with this motion and circulate the same for the approval by this Board.

MOTION CARRIES 3-0.

WILEY: Any other matters that we need to hear today?

TIDEMANN moves GRUENBACHER seconds to adjourn.

MEETING ADJOURNED 5:30 p.m.